Workplace Safety and Insurance Appeals Tribunal

505 University Avenue 7th Floor
Toronto ON M5G 2P2
Tel: (416) 314-8800
Fax: (416) 326-5164
TTY: (416) 212-7035
Toll-free within Ontario
1-888-616-8846

Web Site: www.wsiat.on.ca

Tribunal d'appel de la sécurité professionnelle et de l'assurance contre les accidents du travail

505, avenue University, 7e étage
Toronto ON M5G 2P2
Tél.: (416) 314-8800
Téléc.: (416) 326-5164
ATS: (416) 212-7035
Numéro sans frais dans les limites de l'Ontario: 1-888-616-8846

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Ontario

# Workplace Safety and Insurance Appeals Tribunal

## Quarterly Production and Activity Report

## January 1 to March 31, 2008

Production Summary ..... 2
Production Charts ..... 3
Community Activities ..... 5
Judicial Review Summary ..... 5
Recent Decisions ..... 10

## Production Summary

- The active inventory totalled 4,536 (13% over the target of 4,000 cases). This is an encouraging reduction from the previous quarter result of 4,651.

- Incoming appeals numbered 934 and of these, 783 were appeals from WSIB decisions and 151 appellants advised they were ready to proceed to hearing following a period of inactive status.
  - This compares to 831 new appeals and 147 reactivated appeals recorded in the fourth quarter of 2007.
  - In the 1st quarter of 2007 the Tribunal recorded 830 new appeals and 196 re-activations.
  - In 2007, the weekly average of hearing ready appellants was 59. For Q12008, the weekly average of hearing ready appellants is 57. This figure excludes cases reactivated from inactive status.

- Dispositions numbered 1,174; this includes 387 dispositions in the pre-hearing areas resulting from dispute resolution (ADR) efforts and 787 after hearing dispositions; of the after hearing dispositions, 760 followed from Tribunal decisions.

- In Q1-08, the inactive inventory was 4,066 cases (at the end of Q4-07, the inactive inventory was also 4,066 cases).

- In Q1-08, 87% of final decisions were released within 120 days. In 2007, 86% of final decisions were released within 120 days.

- The Tribunal's long term, or "steady state" target is an active inventory of 4,000 appeals; at this level, the Tribunal will once again be able to deliver on its promise of timely processing of appeals with hearing dates offered within four months of the appeal being confirmed as hearing ready. The Tribunal has made steady progress towards this goal in the last eighteen months; the Q1 active inventory of 4,536 appeals is a significant reduction from a recent high of 5,493 active appeals at the end of the third quarter of 2006. With this progress in appeal inventory reduction, parties should begin to see significant decreases in the time to schedule hearings by the end of 2008.

The Tribunal's Notice of Appeal (NOA) process places responsibility in the hands of the parties and representatives to advance a case, and requires appellants to confirm their readiness to proceed (by filing a Confirmation of Appeal) with their appeals within two years of completing the NOA.

The NOA inventory includes cases that would previously have been closed as inactive by Tribunal intervention. These "dormant" cases are tracked as part of the Tribunal's case management. Many are expected to close as abandoned appeals after a two-year period expires. At the end of the first quarter of 2008, the notice inventory included 1,233 dormant cases, the active inventory totaled 4,536 cases, and the inactive inventory totaled 4,066 cases.

## Production Charts

A. Active Inventory

| Period | Active Inventory |
|---|---|
| Q4-2005 | 5287 |
| Q1-2006 | 5318 |
| Q2-2006 | 5416 |
| Q3-2006 | 5493 |
| Q4-2006 | 5227 |
| Q1-2007 | 5171 |
| Q2-2007 | 5045 |
| Q3-2007 | 4956 |
| Q4-2007 | 4651 |
| Q1-2008 | 4536 |

B. Incoming Appeals

| Period | Incoming Appeals |
|---|---|
| Q4-2005 | 1100 |
| Q1-2006 | 1144 |
| Q2-2006 | 1124 |
| Q3-2006 | 1087 |
| Q4-2006 | 1007 |
| Q1-2007 | 1026 |
| Q2-2007 | 950 |
| Q3-2007 | 939 |
| Q4-2007 | 978 |
| Q1-2008 | 934 |

C. Dispositions

| Period | Dispositions – total | Pre-hearing | After Hearing |
|---|---|---|---|
| Q4-2005 | 1190 | 466 | 724 |
| Q1-2006 | 1146 | 435 | 711 |
| Q2-2006 | 1131 | 477 | 654 |
| Q3-2006 | 1083 | 426 | 657 |
| Q4-2006 | 1161 | 362 | 799 |
| Q1-2007 | 1149 | 383 | 766 |
| Q2-2007 | 1132 | 366 | 766 |
| Q3-2007 | 1031 | 370 | 661 |
| Q4-2007 | 1219 | 427 | 792 |
| Q1-2008 | 1174 | 387 | 787 |

D. Inactive Inventory

| Period | Inactive Inventory |
|---|---|
| Q4-2005 | 4286 |
| Q1-2006 | 4309 |
| Q2-2006 | 4349 |
| Q3-2006 | 4302 |
| Q4-2006 | 4234 |
| Q1-2007 | 4118 |
| Q2-2007 | 4108 |
| Q3-2007 | 4072 |
| Q4-2007 | 4066 |
| Q1-2008 | 4066 |

E. Notice of Appeal (Dormant cases)

| Period | Total Dormant | Change from previous quarter |
|---|---|---|
| Q4-2005 | 1519 | 0 |
| Q1-2006 | 1486 | -33 |
| Q2-2006 | 1381 | -105 |
| Q3-2006 | 1308 | -73 |
| Q4-2006 | 1420 | 112 |
| Q1-2007 | 1353 | -67 |
| Q2-2007 | 1297 | -56 |
| Q3-2007 | 1294 | -3 |
| Q4-2007 | 1358 | 64 |
| Q1-2008 | 1233 | -125 |

## Community Activities

Community activities for 2008 are also noted in the Tribunal's newsletter, In Focus. The newsletter is published twice per year. The current issue is May 2008 and is available at the Tribunal's web site, www.wsiat.on.ca.

In February, Tribunal Vice-Chair Eleanor Smith presented an overview of WSIAT practice directions and procedural issues at the 2008 OBA Institute Administrative Law Program. Counsel to the Chair, Carole Prest was part of the organizing committee for a symposium held in January at the University of Toronto, Faculty of Law; the theme was "The Future of Administrative Justice".

Keep up to date with Tribunal news using an RSS feed! The Tribunal's web site is www.wsiat.on.ca; instructions are located at the bottom of the home page.

## Judicial Review Activity

The status of applications for judicial review involving the Tribunal for the first quarter of 2008 is set out below.

Only those judicial reviews where there was some significant activity during the quarter are listed. There are a number of other pending judicial reviews which were received after the completion of this quarter, or for which no action occurred during this particular quarter.

## Judicial Reviews

### 1. Decisions Nos. 433/99 (June 24, 1999) and 433/99R (May 30, 2000)

A worker had a back injury in April 1979. From 1979 until 1990, there were no records of any back complaints in the Applicant's medical charts. In late 1991 he suffered from an episode of back pain. In 1993 he alleged to the Board that his back problems were related to the 1979 accident 14 years earlier. A report from the worker's specialist supported a link between the accident and the problems. The issue for the Vice-Chair was one of medical continuity, compatibility and causation. The Vice-Chair concluded that the 1979 accident did not cause or contribute to the symptoms after 1990, and denied entitlement.

The judicial review was heard in Sudbury on October 5 2006. A Divisional Court panel of Smith, Kent and Pierce reserved its decision. On November 15 the Divisional Court released its decision granting the application for judicial review and quashing *Decisions Nos. 433/99* and *433/99R*.

The Court held that there were several errors in the Tribunal's fact finding which, although taken individually were small, the cumulative effect of the errors was at odds with the Tribunal's conclusion. While acknowledging the standard of review was patent unreasonableness, the Court held that the Tribunal's findings of fact were erroneous, and a rational conclusion cannot be based on erroneous fact finding.

The Tribunal filed a Notice of Motion for Leave to Appeal. The Court of Appeal granted Leave to Appeal on May 31, 2007 (Rosenberg, Rouleau and Killeen). The appeal was heard by the Court of Appeal on February 1, 2008 (Rouleau, Weiler and Watt). The Court reserved its decision.

Following the release of the Supreme Court of Canada decision in *Dunsmuir v New Brunswick*, the Court of Appeal invited the parties to make further submissions. The Tribunal filed further submissions with the Court of Appeal relating to the standard of review pursuant to *Dunsmuir*. At the end of the quarter the Court had not released its decision.

## 2. Decision No. 855/03 (November 15, 2005)

The worker was a member of a union. Pursuant to the collective agreement, the employer made contributions on the worker's behalf to a benefit plan that provided health and dental care coverage, as well as pension plan coverage. The employer's contributions were based on the hours worked by the worker. Under the terms of the plan, part of the contributions were used to continue the worker's benefits and pension contributions for up to a year after an injury.

The worker was injured. He alleged that the employer's contribution to his benefits should be included in the calculation of his earnings for the purposes of workplace safety and insurance benefits. The worker's appeal was denied. The Vice-Chair held that Board policy did not include benefit payments and pension plans in earnings basis. There was no direct relationship between the employer's contributions and the benefits the worker received. The Vice-Chair also held that the Legislature did not intend to include contributions from all employers in Ontario in the earnings of workers, or that some workers would receive non-taxable income.

The worker commenced an application for judicial review. The Board successfully brought a motion to intervene in the judicial review. The judicial review was heard on June 27.

The Divisional Court Panel of Jennings, Swinton and Lederman released its decision on September 10. The majority of the Panel, consisting of Justices Jennings and Lederman, held the Tribunal's decision was patently unreasonable because it failed to consider evidence of legislative history which were contained in submissions made to the Tribunal Vice-Chair. They ruled the decision should

be referred back to the Tribunal for a re-hearing in accordance with the findings of the majority.

In her dissenting reasons, Justice Swinton held that a failure to refer to legislative history did not render the Tribunal's decision patently unreasonable. She noted this had not been raised before the Board, and was not a major issue referred to in other submissions, and moreover a failure to refer to certain evidence is not necessarily fatal to the decision of an administrative tribunal. Justice Swinton also observed that legislative history plays a limited role in the interpretation of legislation because of concern about its reliability. She held that the Tribunal's conclusion in this case was within its specialized expertise.

The Tribunal filed a notice of motion for leave to appeal to the Court of Appeal. In January the Court of Appeal granted leave to appeal (Winkler, Rosenberg and Lang). The Tribunal has filed its factum with the Divisional Court. The Workplace Safety & Insurance Board will be intervening. It is anticipated the appeal will be heard in the fall.

### 3. Decisions Nos. 172/02I (February 28, 2002), 172/02 (September 22, 2003) and 172/02R (June 30, 2004)

In January 1995 a worker injured his elbow and back. He received total disability benefits from the date of the accident until early 1996, when his benefits were terminated for failing to accept suitable work. The Board reinstated his wage loss benefits effective December 2001, and awarded a 100% future economic loss award in April 2003.

The worker appealed to the Tribunal for entitlement for a psychotraumatic disability and for wage loss benefits from February 1996 to December 2001. In *Decision 172/02* the Vice-Chair granted entitlement for a psychotraumatic disability, but found the worker was not totally disabled until July 1999. The worker's application to reconsider was granted in part in *Decision 172/02R*, allowing the temporary total disability benefits to be further backdated to September 9, 1998. A further request to reconsider for the period benefits was dismissed.

The worker commenced an application for judicial review. The case was heard on October 25 by a Divisional Court Panel of Swinton, Lane and Kitely. The Court reserved its decision.

On January 24 the Divisional Court released its decision, unanimously dismissing the application for judicial review. The Court rejected the Applicant's argument that the Tribunal was required to specifically refer to Board policies which it applied in its decision. The Tribunal's findings of fact were "well reasoned and comprehensive" and not patently unreasonable. A Charter argument raised for the first time on judicial review was dismissed, as the Applicant did not satisfy the

onus of demonstrating the Divisional Court should deal with the constitutional arguments.

Owing to the way the case was argued, the Tribunal decided to seek costs. At the end of the quarter the Divisional Court decision on the Tribunal's request for costs was pending.

**4. Decisions Nos. 167/06 (March 9, 2006) and 167/06R (December 14, 2006)**

The worker's appeal for chronic pain entitlement was denied by the Tribunal. The worker's family doctor had submitted a report suggesting the worker was a malingerer. The Vice-Chair relied on the letter as part of the evidence he considered in denying the appeal.

The worker commenced an application for judicial review. The Tribunal filed its Record of Proceedings with the Court. Following conversations with Tribunal counsel, counsel for the worker was considering whether to bring a further application for reconsideration. At the end of the quarter the Tribunal was waiting to hear the worker's decision.

**5. Decision Nos.893/06 (October 12, 2006) and 893/06R (November 15, 2007)**

The worker's short term earnings were calculated based on his earnings of $25.00 an hour, with no deductions, at the time of the injury. His average earnings were reduced after 13 weeks, at which point they were based on the worker's earnings over the prior 24 months as reported to the Canada Revenue Agency through his income tax returns. The worker's appeal that his earnings should be based on $25.00 an hour was dismissed.

The Vice-Chair found the worker to be a "non-permanent employee" within the meaning of Board policy, and it was appropriate to apply Board policy to recalculate the earnings after 13 weeks to reflect average earnings. The earnings should be based on the net average earnings, not the actual gross earnings. The Vice-Chair held that the income tax records of the worker identified the true nature of the earnings of the worker. The same Vice-Chair denied the worker's application for reconsideration.

The worker served an application for judicial review. At the end of the quarter the Tribunal was waiting for the Applicant to order the transcript of the hearing, to include in the Tribunal's Record of Proceeding.

**6. Decision No.1118/07 (June 14, 2007)**

The plaintiff was allegedly injured while employed at a nuclear generating station. He brought an action against his employer. The defendant employer's

application to the Tribunal for an order taking away the plaintiff's right to sue was granted. The Vice-Chair found the fact the employer may be a federal undertaking did not take away the Tribunal's jurisdiction. The *Nuclear Liability Act* did not limit the right to claim compensation.

The plaintiff commenced an application for judicial review. The Tribunal filed its record of proceedings. The plaintiff agreed to file his factum by April 18, or the judicial review would be dismissed. At the end of the quarter the Tribunal was waiting to receive the plaintiff's factum.

**7. Decision Nos.1248/98 (November 13, 2003) and 1248/98R (October 11, 2007)**

The worker appealed for entitlement to benefits for his injuries to his head, eyes, spine, chest, and rib that the worker related to an accident in March 1993. The worker also sough payment of temporary total disability benefits after June 25, 1993. The hearing took place over four days, starting in August 1998 and concluding in July 2003.

The Panel had concerns about the worker's credibility. The Panel did not accept the worker's version of the accident, or that he suffered the injuries he alleged were caused by the accident. The Panel also found that any injuries suffered by the worker had resolved by June 25, 1993.

The worker commenced an application for judicial review. At the end of the quarter the Tribunal was waiting for the worker to obtain the transcripts of the Tribunal's hearings, to include with the Record of Proceedings to be filed with the Divisional Court.

**8. Decision Nos.207/05 (April 11, 2005) and 207/05R (January 10, 2006)**

The plaintiff was injured in a motor vehicle accident. He was sleeping in a tractor-trailer driven by the defendant driver, and owned by the defendant trucking company. The defendants applied to the Tribunal for an order that the plaintiff's right of action was taken away.

The Vice-Chair found both the plaintiff and the defendant driver were workers of the defendant Schedule 1 trucking company, and that they were in the course of employment at the time of the accident. The Vice-Chair held the plaintiff's right of action was taken away.

The plaintiff commenced an application for judicial review more than two years after the Tribunal's reconsideration decision was released.

At the end of the quarter the Tribunal was preparing its Record of Proceedings.

## Highlights of Recent Decisions

### Jurisdiction-Human Rights Legislation
### Benefits as "Services" under the Ontario Human Rights Code

*Decision No. 1529/04I2* found that the Tribunal had jurisdiction to consider arguments raised by the worker under the Ontario *Human Rights Code* and that benefits payable under the WSIA were not excluded from the definition of "services" under section 1 and 10 in the Code. Section 1 of the *Human Rights Code* provides that every person has a right to equal treatment with respect to services. The word "services" is not defined but s. 10 provides that "services" does not include a levy, fee, tax or periodic payment imposed by law.

The Panel noted that a number of prior Tribunal decisions found that various types of workers' compensation benefits were periodic payments imposed by law and were, therefore, excluded from the protection of the *Human Rights Code*. The Panel commented that this line of decisions should not be followed, as these did not have the benefits of detailed submissions on the issues, as in this case. Also they relied on a Tribunal decision that was released prior to the Supreme Court decision that highlighted the privileged status of human rights legislation.

In considering the Tribunal's jurisdiction to apply the *Human Rights Code*, the Panel referred to *Tranchemontagne v. Ontario (Director, Disability Support Program)*, [2006] SCC 14, 266 D.L.R. (4th) 287 (S.C.C.), which held that by s. 47(2) of the *Human Rights Code*, it has primacy over all other legislative enactments. The Panel also considered *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504 (S.C.C.) which stated that administrative bodies were empowered to decide questions that may presumptively go beyond the bounds of the enabling statute and decide issues of common law or statutory interpretation that arise in the course of a case properly before them. Also
s. 2.1 of the *Workplace Safety and Insurance Act* (WSIA), states that provisions that require a distinction based on age apply despite ss. 1 and 5 of the *Human Rights Code*. Implicitly, then the Code applied to all other matters arising under the WSIA.

In deciding the question of benefits not excluded from the definition of "services" in the Code, the Panel considered the general principle that an Act is remedial and to be given a fair, large and liberal interpretation. Human rights legislation in particular should be given a broad and inclusive interpretation. Several court decisions in other Canadian jurisdictions have found that workers' compensation benefits are services within the meaning of parallel human rights legislation in other provinces. The Panel concluded that the provision of benefits under the WSIA were "services" under the *Human Rights Code*.

While section 10 of the *Human Rights Code* excludes periodic payments imposed by law from the definition of services, those words should be considered in the context of the other preceding words "levy", "fee" and "tax" in s. 10. The Panel interpreted both levy and tax to connote a payment to an authority and a fee as a payment made in exchange for a service of privilege. Considering the context of the words, as well as the

legislative history and transcripts of committee debates, "periodic payment" was meant to apply to payments analogous to taxes or levies, that is, payments to a government authority, rather than benefits received by individual from a government or quasi-governmental authority.

**Occupational Stress- Racial Harassment**

*Decision No. 301/08* denied the worker's claim for occupational stress on the basis of racial harassment at work. The Panel found that the worker did not meet the requirements for entitlement for mental stress. There was no suggestion that the worker experienced an "acute reaction" to a single "sudden and unexpected traumatic event in the workplace". While the worker described a number of upsetting incidents, the Panel found that none could objectively be characterized as "traumatic". The worker was never assaulted or threatened with physical violence, nor was she placed in a life-threatening or potentially life-threatening situation. The Panel accepted that the worker, on a subjective level, was deeply offended by the actions of her co-workers, particularly when subjected to vulgar language she was not used to hearing, and inappropriate reference to her racial background. None of the actions however were ones which, in the Panel's view, could reasonably be interpreted as objectively traumatic, as required by Board policy (OPM Document No. 15-03-02).

The Panel also found that the evidence did not support a finding of entitlement under the cumulative effect component of Board policy. Although the worker described a number of incidents involving disagreements with co-workers, none were objectively traumatic, including the final episode in October 2003 that caused the worker to seek medical care.

The Panel commented that the Ontario Human Rights Commission (OHRC) complaint process which the worker pursued in this case as well as any existing workplace complaint procedures, were more appropriate vehicles available to the worker to deal with this type of behavior.

**Multiple Chemical Sensitivity**

*Decision No. 2802/07* confirmed a 5% Permanent Disability (PD) pension for multiple chemical sensitivity, where the worker had sensitization with no assessable impairment. The Panel noted that Multiple Chemical Sensitivity (MCS) was not listed in the Ontario Rating Schedule (OPM Document No. 18-07-02) which is applicable to accidents covered under the pre-1989 *Workers' Compensation Act*. The Board determined the nominal rating in the same manner as other similar cases of sensitization such as asthma.

The Panel commented that if it had been persuaded that the worker's condition was more serious it may have taken the broad approach used in other Tribunal decisions in rating a condition not within the Ontario Rating Schedule or other rating schedules set out in Board policies. However, the Panel was not convinced of the seriousness of the condition. The Panel noted that the worker did not seek medical attention for a number of years; the symptoms experienced were not serious enough for him to seek

immediate medical attention; the diagnosis of MCS was made a number of years later, following the termination of the worker's benefits; and there was no psychiatric diagnosis flowing from the MCS condition.

**Issue Estoppel- Prior Tribunal Decision**

*Decision No. 1/07I* provides a good synopsis of the current legal test and caselaw on the subject of issue estoppel. In this case the Vice-Chair relied on *Decision 1000/00I* which did a thorough review of the doctrine of *res judicata* and in particular issue estoppel.

The modern rule of estoppel by *res judicata* is grounded upon two broad principles of public policy: first that the state has an interest that there should be an end to litigation, and secondly that no individual should be sued more than once for the same cause or punished more than once for the same offence.

The Vice-Chair agreed that in determining issue estoppel it was first necessary to address the three questions listed in *Danyluk v. Ainsworth Technologies Inc.* [2001] 2S.C.R. 460.If these preconditions are met then the next step is to address whether as a matter of discretion issue estoppel ought to be applied. *Danyluk* sets out a non-exhaustive list of nine factors relevant to the exercise of discretion.

In *Decision No. 1/07 I* a worker raised the argument of issue estoppel in an employer appeal of an Appeals Resolution Officer's (ARO) decision confirming initial entitlement for the worker's back injury. The employer submitted on appeal that the worker had a pre-existing back condition and that entitlement should have been allowed only on an aggravation basis, for three days of benefits. A prior Tribunal decision (*Decision No. 184/04*) awarded the worker 100% FEL benefits as of January 1, 1997 for the worker's back condition.

Reviewing *Decision No. 184/04*, the Vice Chair noted that the decision made final adjudicative findings about the level of the worker's disability and the suitability of the modified work for that disability. Those findings however were based on an assumption of the correctness of the prior adjudication that the disability was compensable. No findings were made here of an adjudicative nature on the issue of aggravation/medical causation (referred to by the Vice-Chair as the "upstream" issue in this case).

The Vice Chair considered that while on its face *Decision 184/04* appeared to be a final decision on the issue of entitlement to benefits after 1997, when read in the context of the ongoing adjudication of the worker's benefits , that finding would have to be read as subject to the outcome of any upstream issues not yet adjudicated. Otherwise, the adjudicative delays at the Board would have deprived the employer of its right to appeal despite the employer's best efforts. This would have resulted in the employer being denied a fair process.

S. Adams
WSIAT, 15 May 2008